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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JACQUELINE DE SITTER, Plaintiff and Respondent, v. DANA GEDRICK et al., Defendants and Appellants.	2d Civil No. B211413 (Super. Ct. No. 1267337) (Santa Barbara County)

Appellants Dana and Jason Gedrick appeal from an order granting respondent a new trial in her unlawful detainer action. The court granted a new trial on the sole ground that it had provided the jury with a special verdict form that allowed it to reach its verdict without considering a necessary issue. Appellants argue that the order granting the new trial must be reversed because the special verdict form was correct and sufficient evidence supports the verdict, among other reasons. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants have three children. After appellants' divorce, Dana was looking for a home for their three children, her boyfriend, and herself. In August 2007, Dana, Jason and respondent signed a one-year lease for respondent's house at 202 East Mountain Drive in Montecito (the residence), at $4,990 per month. Dana and the three children lived there with Dana's boyfriend. Jason never occupied the residence.

In 2005, the parties renewed the lease for another year. On August 11, 2006, they signed a 17-month lease agreement with a December 31, 2007, termination date (the 17-month lease). The 17-month lease provided that either party could terminate the lease before December 31 by giving 30 days' written notice. None of the parties terminated the lease before December 31.

On January 30, 2008, respondent sent Dana a document entitled "Lease Agreement: Renewal," with several provisions, including the following: "Owner and tenant agree to continue the [17-month] lease agreement. [¶] *Terms: Month-to-month basis, commencing on 3/1/08. [¶] Rate: $5,240/mo. [¶] The property may be considered for sale by owner starting on 3/1/08. It may be removed from the market at any time, depending on market conditions. The estimated listing time is 6 months. Should it be listed for sale, owner offers tenant the following concessions, in return for her cooperation with marketing activities: [¶] . . . [I]f an accepted offer is made, the tenant shall be allowed a minimum of 45 days' notice during escrow instead of 30 days. [¶] *Rent will . . . remain at the rate of $4,990/mo. during the marketing period. [¶] *Rebate: owner offers tenant a rebate of $200/mo. during the marketing period, paid upon the tenant's vacancy. . . ." The lease further provides that tenant would have right of first refusal to purchase the residence and would agree to "cooperate with marketing activities," including allowing "*Lock-box by appointment: lock-box to be placed on front door, and agents to give tenant 24 hour notice of a scheduled showing[;] and *Showings: 1) By appointment, as above [¶] 2) Caravans: at least once/mo. [¶] 3) Open houses: at least twice/mo. . . . ."

On February 5, 2008, Dana faxed respondent a reply stating that it would be very disruptive for anyone to enter the residence before the end of the school year. She asked respondent to delay showing the residence until June. She also offered to sign a four-month lease.

Respondent emailed Dana a message on the same day, explaining that spring and summer were optimal for marketing real estate; that she only planned to "test-market the home for six months, so marketing would be completed by 8/31/08, when the

children return to school;" that she might "choose to not sell it," and that Dana could receive a monthly discount of $450 and "potentially continue to rent the home for years to come." In her email message, respondent further stated that any showings would be "[l]ock box by appointment" with 24-hours' advance notice to Dana. The message also indicated that the "home [would] be listed for sale on Sat., March 3[,] 2008" and asked that Dana inform respondent of her "decision to stay . . . or if [she would] be moving by 2/29/08."

On February 8, Dana emailed respondent a message expressing reservations about the lock box. She explained that she needed to be present during any showings because she had expensive equipment there, and that the showings would disrupt her work.

On February 12, respondent emailed Dana a message saying that she spoke with Jason who had "expressed a desire to extend the lease and offered full cooperation with the showings." The message further stated that Jason "discussed two concerns which [respondent would] honor" concerning the hours of showings, key availability, and lock box conditions. Respondent proposed extending the lease, if those conditions were agreeable to Dana, "to be signed by 2/19/08." If Dana did not agree to the conditions, respondent indicated she would anticipate that Dana would vacate the premises by "3/1/08." At trial, Jason recalled that when respondent called him, he told her to "talk to Dana about it" and that he "couldn't make decisions for Dana in the house that she's occupied." In her February 12 email message, respondent provided Dana a list of tentative dates in late February, early, mid and late March when respondent would need access to the residence to inspect it, show it to an agent, and conduct open house events. Respondent and Dana later spoke on the telephone but never reached a lease renewal agreement.

On February 16, 2008, respondent served a 60-day notice of termination of tenancy on appellants by posting it on the front door of the residence. She also served them by mail, at the residence.

Until late February 2008, there were approximately 35 mailboxes on the residence property, near the street. The mailboxes had been there for decades. Dana received mail in one of the boxes; the remaining boxes were for neighbors. Respondent testified that "some crazy person would" bash up the mail boxes approximately twice a year. Respondent decided to get rid of the "35 battered, smashed mailboxes sitting right in front of the house," because they would not appeal to potential purchasers of her property. On February 28, 2008, before 9:00 a.m., workers removed the mailboxes with a chain saw. The record contains disputed evidence concerning whether and when Dana and other residents of the neighborhood received notice that their mailboxes would be removed.

On March 7, respondent served notice to change the terms of the tenancy to increase the lease payment to $12,000 a month, retroactive, as of January 1, 2008. There is no evidence that appellants ever paid respondent more than $4,990 per month.

On April 16, respondent filed an unlawful detainer action against appellants seeking damages, recovery of the premises, and other relief. At trial, the parties stipulated that the payments were current through April 16, 2008.

Following trial, a jury returned a verdict finding that respondent had wrongfully retaliated against Dana for asserting her right to limit unreasonable access to the residence. The court entered judgment for appellants.

Respondent filed a motion for new trial on multiple grounds, and a motion for judgment notwithstanding the verdict. The court denied the latter motion but granted respondent a new trial on the sole ground that the special verdict form had allowed the jury to reach its verdict without making a requisite factual finding -- whether respondent had a good faith, non-retaliatory motive for the eviction.

DISCUSSION

Appellants argue that the court erred in granting respondent a new trial. We disagree.

The standard of review of an order granting a new trial motion is both well established and highly deferential. On review, all presumptions are in favor of the order

granting a new trial. The appellate court will reverse only if a manifest and unmistakable abuse of discretion is shown. (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 109.)

"'[T]he presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order.' [Citation.] [¶] The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.' [Citation.] Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations. [¶] . . . The only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evidence in the record to support those reasons. [Citation.]" (*Lane v. Hughes Aircraft Co*. (2000) 22 Cal.4th 405, 412.)

An order granting a new trial "will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside. [Citations.]" (*Jiminez v. Sears, Roebuck & Co*. (1971) 4 Cal.3d 379, 387.)

Appellants presented a retaliatory eviction defense to respondent's unlawful detainer action. A landlord may evict tenants, even if the landlord has a retaliatory motive, provided the landlord also has bonafide intent. (*Drouet v. Superior Court* (2003) 31 Cal.4th 583, 597.) Where the landlord cannot establish a good faith intent, the fact finder must decide whether the eviction was retaliatory. (*Id.* at pp. 599-600.)

In this case, the instructions correctly informed jurors: "If you find that [appellants] have proven by a preponderance of the evidence that [respondent] wrongfully retaliated against either of them, then you must find in favor of [appellants] unless [respondent] proves by a preponderance of the evidence a good faith, legitimate, and non-retaliatory reason for evicting [appellants] that is not a pretext to justify the

wrongful conduct of retaliation." Respondent requested a special verdict form that would direct the jury to determine whether respondent had a good faith, legitimate and non-retaliatory reason for evicting appellants. The court denied respondent's request and modified its verdict form by adding the word wrongfully to question 1 of the special verdict. It provided the jury with a special verdict form that asked: "1. Did [respondent] wrongfully retaliate against Dana Gedrick for asserting her rights to limit unreasonable access to the residence at 202 E. Mountain Drive?" If the jury answered "yes," the special form directed it to answer no further questions before signing and returning the verdict form to the bailiff.

During deliberations, the jury asked a question regarding the difference between unlawfully and wrongfully. It also asked for the definition of retaliation. After discussing the matter with counsel, the court informed the jury that unlawful is that which is contrary to law or unauthorized by law, and that retaliation means to return like for like. Shortly after receiving the court's answers to its questions, the jury returned its verdict. It responded "yes" to the question of whether respondent wrongfully retaliated against Dana for asserting her rights to limit unreasonable access to the residence. The jury answered no further questions, pursuant to the directions of the verdict form.

The court considered written and oral argument and concluded that its special verdict form had confused the jury and made it possible for them to reach a verdict without considering a necessary issue -- whether respondent had a good faith, legitimate, and non-retaliatory reason for evicting appellants. It granted a new trial and provided a statement of reasons for its ruling. Its reasons are supported by substantial evidence. (*Lane v. Hughes Aircraft Co., supra,* 22 Cal.4th at p. 412.)

In attacking the court's order granting a new trial, appellants make a variety of arguments. Their arguments are not persuasive. Where a court has exercised its discretion in favor of awarding a new trial, we will not disturb its order "unless a manifest and unmistakable abuse of discretion clearly appears." We find none here. (*Jiminez v. Sears, Roebuck & Co., supra,* 4 Cal.3d at p. 387.)

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

Respondent's motion to dismiss appeal for mootness is denied.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

James W. Brown, Judge

Superior Court County of Santa Barbara

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